

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:
ROGER DUONG,
Debtor.

Case No. 95-57689-JRG
Chapter 7

KIEU DUONG,
Plaintiff,
vs.

Adversary No. 96-5155

ROGER DUONG,
Defendant.

MEMORANDUM DECISION

I. INTRODUCTION

In this case plaintiff, the defendant's former wife, seeks a nondischargeability judgment under § 523 of the Bankruptcy Code. Plaintiff's primary theory of recovery is under § 523(a)(4) based upon her allegation that the defendant committed defalcation while acting in a fiduciary capacity. Plaintiff also alleges that she is entitled to recover based on fraud under § 523 (a)(2)(A). For the reasons hereafter stated

1 judgment will be rendered in favor of defendant.

2 **II. FACTUAL BACKGROUND**

3 The facts in this case are not complicated. Roger Duong
4 and Kieu Duong were married in 1986. In 1990, Roger and Kieu
5 obtained a \$50,000 line of credit from Pacific Western Bank.
6 Both Roger and Kieu signed the Bank's documents. The line was
7 thereafter used on a couple of occasions and the money borrowed
8 was repaid.

9 Marital difficulties then developed and on July 31, 1992,
10 Roger and Kieu separated. At that time no money was owed on the
11 Pacific Western credit line. Shortly after the separation, on
12 August 16, 1992, Roger began drawing against the line of credit.
13 By May 14, 1993, he had borrowed over \$48,000 from Pacific
14 Western Bank. Kieu was unaware of Roger's actions.

15 A judgment dissolving Roger and Kieu's marriage was entered
16 on February 8, 1994. From the evidence presented it is unclear
17 what action, if any, the Family Law Court took with respect to
18 the obligation owed to Pacific Western Bank. The evidence does
19 show that the existence of the obligation was disclosed in the
20 dissolution proceeding. An Income and Expense Declaration filed
21 in the proceeding by Roger Duong on June 9, 1993, made specific
22 reference to the money owed Pacific Western Bank.

23 Roger Duong made payments to Pacific Western Bank during
24 1992, 1993, 1994 and up until August 1995 when he stopped. In
25 October 1995 the Bank filed suit against Roger and Kieu for the
26 amount owed. On November 25, 1995, Roger filed bankruptcy.
27 Pacific Western subsequently obtained a judgment against Kieu in
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1 the amount of \$47,228.53.

2 **III. DISCUSSION**

3 **A. The Defendant Did Not Commit Defalcation While Acting**
4 **In A Fiduciary Capacity.**

5 In order for the plaintiff to recover under § 523(a)(4),
6 she must prove that the defendant committed fraud or defalcation
7 while acting in a fiduciary capacity, embezzlement or larceny.
8 Plaintiff's claim under § 523(a)(4) is based on defalcation
9 while acting in a fiduciary capacity.

10 The term "defalcation" as used under § 523(a)(4) does not
11 have a precise definition and no legislative history or comment
12 exists to aid the interpretation. In re Twitchell, 72 B.R. 431,
13 434 (Bankr. D. Utah, C.D. 1987). However, courts interpreting
14 the term have agreed that defalcation refers to the
15 misappropriation of trust funds or money held in any fiduciary
16 capacity; the failure to properly account for such funds. In re
17 Niles, 97 Daily Journal D.A.R. 1496 (9th Cir. 1997) citing Lewis
18 v. Scott (In re Lewis), 97 F.3d 1182, 1186 (9th Cir. 1996). The
19 definition of defalcation in Black's Law Dictionary has often
20 been used by courts for guidance. Defalcation has been held to
21 be "the failure to meet an obligation, misappropriation of trust
22 funds or money held in any fiduciary capacity, and failure to
23 properly account for such funds." In re Garver, 180 B.R. 181,
24 184 (Bankr.N.D. Ohio 1995).

25 Although courts have not used a precise definition, there
26 are certain elements which are common throughout discussions of
27 defalcation and are helpful in determining what constitutes
28 defalcation. Thus, in order to satisfy the defalcation

1 requirement under § 523(a)(4) there must be: (1) money or
2 property of another, (2) entrusted to a fiduciary, (3) which the
3 fiduciary fails to account for, (4) resulting in a breach of
4 fiduciary duty.

5 Like her fraud claim, plaintiff's defalcation claim is
6 based on Roger's borrowing against the Pacific Western line of
7 credit, a joint account, without telling her. The four elements
8 above must be satisfied for conduct to constitute defalcation.
9 First, defalcation requires that the subject funds must be the
10 money or property of another. That is, one may not commit
11 defalcation by failing to account for one's own property. In
12 the case at hand, the Pacific Western line of credit funds are
13 property of both Roger and Kieu. Both Roger and Kieu had equal
14 ability to draw on the line of credit, and each would be equally
15 responsible for repaying the entire balance. By drawing on his
16 own account, Roger could not have committed defalcation. Thus,
17 there was no property or money of another.

18 Second, defalcation requires the funds to be entrusted to
19 the defendant. Here, the Pacific Western line of credit funds
20 were never entrusted to Roger. In fact, as discussed above, the
21 funds were Roger's own property. The court does not find that
22 Kieu, by virtue of not being the one responsible for the marital
23 finances, had entrusted Roger with the funds. Thus, there was
24 no entrustment of the funds.

25 Third, defalcation requires that the defendant fail to
26 account for the funds. Roger had accounted for the funds by
27 disclosing the obligation on his Income and Expense Declaration
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1 filed in his marital dissolution proceeding. In addition, Roger
2 has sufficiently explained how he used the funds. Thus, there
3 was no failure to account for the funds.

4 Fourth, defalcation requires that the defendant's conduct
5 result in a breach of fiduciary duty. There is no legal duty
6 that requires a husband and wife to account to each other for
7 every dollar spent from a joint account. Roger did not breach
8 any duty to Kieu because he had no legal duty to account to Kieu
9 for money spent on their joint account. Thus, there was no
10 breach of fiduciary duty.

11 After considering the evidence presented and evaluating the
12 credibility of the witnesses, the court does not believe that
13 Roger Duong failed to account for the Pacific Western line of
14 credit funds. In conclusion, defalcation has not been
15 established.

16 **B. The Defendant Did Not Commit Fraud.**

17 In order for the plaintiff to recover under § 523(a)(2)(A),
18 she must prove that a materially false representation was made
19 by the defendant, with knowledge of its falsity, and with an
20 intent to defraud, that the plaintiff justifiably relied on the
21 represent-ation, and that damage proximately resulted. In re
22 Kirsh, 973 F. 2d 1454 (9th Cir. 1992); In re Britton, 950 F.2d
23 602 (9th Cir. 1991); In re Howarter, 114 B.R. 682 (9th Cir.
24 B.A.P. 1990).

25 Plaintiffs fraud theory is based on Roger's borrowing
26 against the Pacific Western line without telling Kieu. It is
27 true that in some circumstances silence can be the basis of a
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1 false impression actionable under § 523(a)(2)(A). In a business
2 setting, concealed facts may create a material misrepresentation
3 if a reasonable man would attach importance to the omissions in
4 determining his course of action. See, e.g. In re Evans, 181
5 B.R. 508 (Bkrtcy.S.D.Cal. 1995) [withheld fact that vacant lot
6 was not buildable in its present state]; In re Pommerer, 10 B.R.
7 935 (1981) [concealed intention not to ship goods]; In re
8 Quintana, 4 B.R. 508 (1980) [conceal fact that portion of cattle
9 herd was leased]. However, this is not a business setting or
10 even a discussion in which certain facts were omitted. No
11 discussion at all took place. Plaintiff has provided no legal
12 authority requiring Roger to advise Kieu that he intended to
13 borrow against the line of credit before doing so.

14 Similarly, plaintiff has not established that a false fact
15 or impression existed or that there was an intent to defraud.
16 After considering the evidence presented and evaluating the
17 credibility of the witnesses, the court does not believe that
18 Roger Duong borrowed from Pacific Western Bank with no intention
19 of repaying the loan or that he had any intention to defraud
20 Kieu Duong. As a result, fraud has not been established.

21 **IV. CONCLUSION**

22 For the foregoing reasons, the court finds for the
23 defendant. The foregoing shall constitute the court's findings
24 of fact and conclusions of law pursuant to Bankruptcy Rule 7052
25 and Federal Rule 52. Counsel for defendant shall lodge a
26 proposed form of judgment with the court within 15 days. It
27 need not contain the findings of fact and conclusions of law
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1 which the court has made herein.

2 DATED: _____

JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE